



(Billing Code 7510-13)

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1274

RIN 2700-AE25

Cooperative Agreements with Commercial Firms (NASA Case 2015-N014)

AGENCY: National Aeronautics and Space Administration.

ACTION: Proposed rule.

SUMMARY: NASA is proposing to amend its regulations to implement section 872 of the National Defense Authorization Act for Fiscal Year 2009, as the statute applies to grants and cooperative agreements. The revision is part of NASA's retrospective plan under Executive Order (EO) 13563 completed in August 2011.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by NASA Case 2015-N014, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "NASA Case 2015-N014" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that

corresponds with "NASA Case 2015-N014." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "NASA Case 2015-N014" on your attached document.

- o E-mail: Comments may be sent to Barbara J. Orlando. Include NASA Case 2015-N014 in the subject line of the message.

- o Fax: (202) 358-3082.

- o Mail: National Aeronautics and Space Administration, Headquarters, Office of Procurement, Contract and Grant Policy Division, Attn: Barbara J. Orlando, Room 5L32, 300 E. Street SW, Washington, DC 20546-0001.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Barbara J. Orlando, NASA HQ, Office of Procurement, Contract and Grant Policy Division, Room 5L32, 300 E. Street SW, Washington, DC 20456-0001. Telephone 202-358-3740; facsimile 202-358-3082.

SUPPLEMENTARY INFORMATION:

I. Background

NASA is proposing to revise 14 CFR part 1274, to implement Section 872 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 (Pub. L. No. 110-417, codified as amended at 41 U.S.C. 2313), which established a database that includes governmentwide data with specified information related to the integrity and performance of entities awarded Federal grants and contracts.

On July 22, 2015, the Office of Management and Budget (OMB) issued final guidance, *Guidance for Reporting and Use of Information Concerning Recipient Integrity and Performance* (<https://www.gpo.gov/fdsys/pkg/FR-2015-07-22/pdf/2015-17753.pdf>) to Federal agencies to implement section 872 of the NDAA for FY 2009, (hereafter referred to as "section 872") for grants and cooperative agreements that were subject to the regulations published under 2 CFR Part 200. Pursuant to section 872, OMB and the General Services Administration (GSA) established an integrity and performance system that includes government-wide data with specified information related to the integrity and performance of entities awarded Federal grants, cooperative agreements, and contracts. This system, as the Federal Awardee Performance and Integrity Information System (FAPIIS), integrates various sources of information on the eligibility of organizations for Government awards and is currently available at <https://www.fapiis.gov>.

This rule proposes to implement the requirements of section 872 for recipients and NASA staff to report information that will appear in FAPIIS. In addition, section 872 requires NASA to consider information contained within the system about a non-Federal entity before awarding a grant or cooperative agreement to that non-Federal entity. The proposed rule also addresses how FAPIIS and other information may be used in assessing recipient integrity.

The major elements proposed in this rule are as follows:

- NASA is to report information in FAPIIS about—
 - Any termination of an award due to a material failure to comply with the award terms and conditions;
 - Any administrative agreement with a non-Federal entity to resolve a suspension or debarment proceeding; and
 - Any finding that a non-Federal entity is not qualified to receive a given award, if the finding is based on criteria related to the non-Federal entity's integrity or prior performance under Federal awards and it is anticipated that the total Federal funding will exceed the simplified threshold during the period of performance.
- Recipients that have Federal contract, grant, and cooperative agreement awards with a cumulative total value greater than \$10,000,000 must enter information in FAPIIS about certain civil, criminal, and administrative proceedings that reached

final disposition within the most recent five year period and that were connected with the award or performance of a Federal award.

- Recipients that have been awarded a Federal contract, grant, and cooperative agreement with a cumulative total value greater than \$10,000,000 are required to disclose semiannually the information about the criminal, civil, and administrative proceedings as described in section 872 (c).
- Federal awarding agencies, prior to making an award to a non-Federal entity, must review FAPIIS to determine whether that non-Federal entity is qualified to receive the Federal award. In making the determination, NASA must take into consideration any information about the entity that is in FAPIIS.
- Notice of funding opportunities and Federal award terms and conditions to inform a non-Federal entity that it may submit comments in FAPIIS about any information that NASA had reported to the system about the non-Federal entity, for consideration by NASA in making future Federal awards to the non-Federal entity.

II. Discussion

Section 872 applies without distinguishing between for-profit and other recipients. Thus agencies must apply the requirements reflected in this guidance to for-profit recipients by way of

agency regulations, policies, or directly through the terms and conditions of Federal awards.

NASA grants and cooperative agreements to commercial firms, when cost share is required, are not covered under 2 CFR 200, but under regulations promulgated in 14 CFR 1274. Accordingly, NASA is proposing to amend 14 CFR 1274, Cooperative Agreements with Commercial Firms, to incorporate the new guidelines implementing section 872.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Paperwork Reduction Act

The rule contains collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35); however, these changes to 14 CFR 1274 do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 3090-0293, titled *Reporting and Use of Information Concerning Integrity and Performance of Recipients of Grants and Cooperative Agreements*.

List of Subjects in 14 CFR Part 1274

Government financial assistance.

Manuel Quiñones,

NASA Federal Register Liaison.

Accordingly, 14 CFR Part 1274 is proposed to be amended as follows:

PART 1274—COOPERATIVE AGREEMENTS WITH COMMERCIAL FIRMS

1. The authority citation for 14 CFR part 1274 continues to read as follows:

Authority: 51 U.S.C. 20113(e) and 31 U.S.C. 6301 to 6308; 51 U.S.C. 20102, *et seq.*

2. Amend § 1274.203 by adding paragraph (g) to read as follows:

§ 1274.203 Solicitations/cooperative agreement notices.

* * * * *

(g) If NASA anticipates that the total Federal share of any award made under a funding agreement may exceed, over the period of performance, the simplified acquisition threshold, the notice of funding opportunity must include the information as required in Appendix 1 to Part 200, paragraph E.3, paragraph E.4, and paragraph F.3

3. Amend §1274.209 by redesignating paragraphs (e) through (l) as (f) through (m), respectively and adding a new paragraph (e) to read as follows:

§ 1274.209 Evaluation and selection.

* * * * *

(e)(1) Prior to making a Federal award, agreement officers are required by 31 U.S.C. 3321 and 41 U.S.C. 2313 note, to review information available through any OMB-designated repositories of governmentwide eligibility qualification, currently the System of Award Management(SAM), or financial integrity information (currently Federal Awardee Performance and Integrity Information System (FAPIIS)), as appropriate. See also suspension and debarment requirements at 2 CFR part 180 as well as individual Federal agency suspension and debarment regulations in title 2 of the Code of Federal Regulations.

(2) In accordance with 41 U.S.C. 2313, agreement officers are required to review the non-public segment of FAPIIS prior to making a Federal award where the Federal share is expected to

exceed the simplified acquisition threshold, defined in 41 U.S.C. 134, over the period of performance. At a minimum, the information in the system for a prior Federal award recipient must demonstrate a satisfactory record of executing programs or activities under Federal grants, cooperative agreements, or procurement awards; and integrity and business ethics. NASA may make a Federal award to a recipient who does not fully meet these standards, if it is determined that the information is not relevant to the current Federal award under consideration or there are specific conditions that can appropriately mitigate the effects of the non-Federal entity's risk in accordance with 2 CFR 200 section 200.207, Specific conditions.

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4. Amend § 1274.211 by:

a. In paragraph (c), removing "*Central Contractor Registration (CCR)*" and adding "*System for Award Management (SAM)*"; removing "Department of Defense (DOD) Central Contractor Registration (CCR)" and adding "System for Award Management"; removing "CCR" and adding "SAM"; and removing "http://www.ccr2000.com or by calling toll free: 888-227-2423, commercial: 616-961-5757" and adding "sam.gov" in its place; and

b. Adding paragraph (d)(5) to read as follows:

§1274.211 Award procedures.

* * * * *

(d) ***

(5) The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the assigned agreement officer or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Non-Federal entities that have received a Federal award including the term and condition outlined in Appendix XII - Award Term and Condition for Recipient Integrity and Performance Matters are required to report certain civil, criminal, or administrative proceedings to SAM. Failure to make required disclosures can result in any of the remedies described in §200.338 Remedies for noncompliance, including suspension or debarment. (See also 2 CFR part 180, 31 U.S.C. 3321, and 41 U.S.C. 2313.)

5. Amend § 1274.212 by revising the section heading and adding paragraph (c) to read as follows:

§1274.212 Award information.

* * * * *

(c) *Recipient integrity and performance matters.* If the total Federal share of the Federal award is more than \$500,000 over the period of performance, agreement officers must include the terms and conditions in § 1274.944 of this chapter.

6. Amend subpart 1274.3 by adding new §§ 1274.303 and 1274.304 to read as follows:

§ 1274.303 Public access to Federal award information.

(a) In accordance with statutory requirements for Federal spending transparency (e.g., FFATA), except as noted in this section, for applicable Federal awards NASA must announce all Federal awards publicly and publish the required information at www.USAspending.gov.

(b) All information posted in FAPIIS, accessible through SAM, on or after April 15, 2011 will be publicly available after a waiting period of 14 calendar days, except for—

(1) Past performance reviews required by Federal Government contractors in accordance with the Federal Acquisition Regulation (FAR) 42.15;

(2) Information that was entered prior to April 15, 2011; or

(3) Information that is withdrawn during the 14-calendar day waiting period by the Federal Government official.

(c) Nothing in this section may be construed as requiring the publication of information otherwise exempt under the Freedom of Information Act (5 U.S.C 552), or controlled unclassified information pursuant to Executive Order 13556.

§ 1274.304 Reporting a determination that a non-Federal entity is not qualified for a Federal award.

(a) If NASA does not make a Federal award to a non-Federal entity because the agreement officer determines that the non-Federal entity does not meet either or both of the minimum

qualification standards, as described in paragraph (a)(2) of title 2 CFR part 200 section 200.205, the agreement officer must report that determination in FAPIIS, accessible through SAM, only if all of the following apply:

(1) The only basis for the determination described in paragraph (a) of this section is the non-Federal entity's prior record of executing programs or activities under Federal awards or its record of integrity and business ethics, as described in paragraph (a)(2) of 2 CFR 200.205, (i.e., the entity was determined to be qualified based on all factors other than those two standards); and

(2) The total Federal share of the Federal award that otherwise would be made to the non-Federal entity is expected to exceed the simplified acquisition threshold over the period of performance.

(b) Agreement officers are not required to report a determination that a non-Federal entity is not qualified for a Federal award if they make the Federal award to the non-Federal entity and includes specific award terms and conditions (see CFR 1274.209).

(c) If the agreement officer reports a determination that a non-Federal entity is not qualified for a Federal award, as described in paragraph (a) of this section, the agreement officer also must notify the non-Federal entity that—

(1) The determination was made and reported to FAPIIS, accessible through SAM, and include with the notification an explanation of the basis for the determination;

(2) The information will be kept in the system for a period of five years from the date of the determination, as required by section 872 of Pub. L. No.110-417, as amended (41 U.S.C. 2313), then archived;

(3) Agreement officers making a Federal award to the non-Federal entity during that five year period must consider the information found in FAPIIS when judging whether the non-Federal entity is qualified to receive the Federal award when the total Federal share of the Federal award is expected to include an amount of Federal funding in excess of the simplified acquisition threshold over the period of performance of the award;

(4) The non-Federal entity may go to the awardee integrity and performance portal accessible through SAM (currently the Contractor Performance Assessment Reporting System (CPARS)) and comment on any information the system contains about the non-Federal entity itself; and

(5) Agreement officers will consider that non-Federal entity's comments in determining whether the non-Federal entity is qualified for a future Federal award.

(d) If the agreement officer enters information into FAPIIS about a determination that a non-Federal entity is not qualified for a Federal award and subsequently—

(1) Learns that any of that information is erroneous, the agreement officer must correct the information in the system within three business days; and

(2) Obtains an update to that information that could be helpful to other Federal awarding agencies, the agreement officer is strongly encouraged to amend the information in the system to incorporate the update in a timely way.

(e) The agreement officer shall not post any information that will be made publicly available in the non-public segment of designated integrity and performance system that is covered by a disclosure exemption under the Freedom of Information Act. If the recipient asserts within seven calendar days to NASA that some or all of the information made publicly available is covered by a disclosure exemption under the Freedom of Information Act, agreement officers must remove the posting within seven calendar days of receiving the assertion. Prior to reposting the releasable information, agreement officers must resolve the issue in accordance with the agency's Freedom of Information Act procedures.

7. Amend section 1274.701 by adding paragraphs (b) (5) through (b) (8), (c), and (d) to read as follows:

1274.701 Suspension or termination.

* * * * *

(b) * * *

(5) When NASA terminates a Federal award prior to the end of the period of performance due to the non-Federal entity's material failure to comply with the Federal award terms and conditions, NASA must report the termination in FAPIIS.

(6) The information required under paragraph (b) of this section is not to be reported to designated integrity and performance system until the non-Federal entity either—

(i) Has exhausted its opportunities to object or challenge the decision, see §200.341 Opportunities to object, hearings and appeals; or

(ii) Has not, within 30 calendar days after being notified of the termination, informed the agreement officer that it intends to appeal the decision to terminate.

(7) If the agreement officer, after entering information into FAPIIS about a termination, subsequently:

(i) Learns that any of that information is erroneous, the agreement officer must correct the information in the system within three business days;

(ii) Obtains an update to that information that could be helpful to other Federal awarding agencies, the agreement

officer is strongly encouraged to amend the information in the system to incorporate the update in a timely way.

(8) Agreement officers shall not post any information that will be made publicly available in the non-public segment of designated integrity and performance system that is covered by a disclosure exemption under the Freedom of Information Act. If the non-Federal entity asserts within seven calendar days to the Federal awarding agency who posted the information that some of the information made publicly available is covered by a disclosure exemption under the Freedom of Information Act, agreement officers must remove the posting within seven calendar days of receiving the assertion. Prior to reposting the releasable information, agreement officers must resolve the issue in accordance with the agency's Freedom of Information Act procedures.

(c) When a Federal award is terminated or partially terminated, both NASA or the pass-through entity and the non-Federal entity remain responsible for compliance with the closeout and post-closeout requirements and continuing responsibilities.

(d) *Notification of termination requirement.* If the Federal award is terminated for the non-Federal entity's material failure to comply with the Federal statutes, regulations, or terms and conditions of the Federal award, the notification must state that—

(1) The termination decision will be reported in FAPIIS, accessible through SAM;

(2) The information will be available in FAPIIS for a period of five years from the date of the termination, then archived;

(3) When considering making a Federal award to the non-Federal entity during that five year period, NASA must consider that information in judging whether the non-Federal entity is qualified to receive the Federal award, when the Federal share of the Federal award is expected to exceed the simplified acquisition threshold over the period of performance;

(4) The non-Federal entity may comment on any information that the OMB-designated integrity and performance system contains about the non-Federal entity for future consideration by NASA. The non-Federal entity may submit comments to the awardee integrity and performance portal accessible through SAM (currently CPARS).

(5) Agreement officers will consider non-Federal entity comments when determining whether the non-Federal entity is qualified for a future Federal award.

8. Add § 1274.803 to read as follows:

§ 1274.803 Suspension and Debarment.

Non-federal entities are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 CFR part 180, adopted by NASA at 2 CFR

part 1880. These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

9. Amend subpart 1274.9 by adding § 1274.944 to read as follows:

§ 1274.944 Award term and condition for recipient integrity and performance matters.

(a) *Reporting of matters related to recipient integrity and performance.*

(1) *General reporting requirement.*

(i) If the total value of your currently active grants, cooperative agreements, and procurement contracts from all Federal awarding agencies exceeds \$10,000,000 for any period during the period of performance of this Federal award, then you as the recipient during that period of time must maintain the currency of information reported in FAPIIS about civil, criminal, or administrative proceedings described in paragraph 2 of this award term and condition. This is a statutory requirement under section 872 of Public Law 110-417, as amended (41 U.S.C. 2313).

(ii) As required by section 3010 of Public Law 111-212, all information posted in FAPIIS on or after April 15, 2011,

except past performance reviews required for Federal procurement contracts, will be publicly available.

(2) *Proceedings about which you must report.* Submit the information required about each proceeding that—

(i) Is in connection with the award or performance of a grant, cooperative agreement, or procurement contract from the Federal Government;

(ii) Reached its final disposition during the most recent five year period; and

(iii) Is one of the following:

(A) A criminal proceeding that resulted in a conviction, as defined in paragraph (a)(2)(iii)(A)(5) of this section.

(B) A civil proceeding that resulted in a finding of fault and liability and payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more.

(C) An administrative proceeding, as defined in paragraph (a)(2)(iii)(A)(5) of this section, that resulted in a finding of fault and liability and your payment of either a monetary fine or penalty of \$5,000 or more or reimbursement, restitution, or damages in excess of \$100,000.

(D) Any other criminal, civil, or administrative proceeding if—

(1) It could have led to an outcome described in paragraph (a)(2)(iii)(A), (B), or (C) of this section;

(2) It had a different disposition arrived at by consent or compromise with an acknowledgment of fault on your part; and

(3) The requirement in this award term and condition to disclose information about the proceeding does not conflict with applicable laws and regulations.

(3) *Reporting procedures.* Enter in the SAM Entity Management area the information that SAM requires about each proceeding described in paragraph (a)(2)(iii)(A)(5) of this section. You do not need to submit the information a second time under assistance awards that you received if you already provided the information through SAM, because you were required to do so under Federal procurement contracts that you were awarded.

(4) *Reporting frequency.* During any period of time when you are subject to the requirement in paragraph (a)(1) of this section, you must report proceedings information through SAM for the most recent five year period, either to report new information about any proceeding(s) that you have not reported previously or affirm that there is no new information to report. Recipients that have Federal contract, grant, and cooperative agreement awards with a cumulative total value greater than \$10,000,000 must disclose semiannually any information about the criminal, civil, and administrative proceedings.

(5) *Definitions.* For purposes of this award term and condition:

(i) Administrative proceeding means a non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative proceedings, Civilian Board of Contract Appeals proceedings, and Armed Services Board of Contract Appeals proceedings). This includes proceedings at the Federal and State level but only in connection with performance of a Federal contract or grant. It does not include audits, site visits, corrective plans, or inspection of deliverables.

(ii) Conviction, for purposes of this award term and condition, means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

(6) Total value of currently active grants, cooperative agreements, and procurement contracts includes—

(i) Only the Federal share of the funding under any Federal award with a recipient cost share or match; and

(ii) The value of all expected funding increments under a Federal award and options, even if not yet exercised.